STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN E. MCALPINE and RONALD KEITH WHEELER, Plaintiffs-Appellants, v DAVID EINSTANDIG and THAV GROSS STEINWAY & BENNETT, P.C., Defendants-Appellees.	UNPUBLISHED March 22, 2007 No. 266428 Oakland Circuit Court LC No. 2005-064357-NM

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

In this legal malpractice action, plaintiffs appeal as of right an order dismissing their claims for failure to appear at a pretrial conference. We affirm.

In the underlying action, plaintiffs retained defendants to investigate their interest in and pursue a quiet title action concerning certain real property purchased at a tax sale. Defendants filed a quiet title action, naming the United States as a defendant because of various federal tax liens existing on the property. During the course of the action, plaintiffs terminated defendants' representation of them. Shortly thereafter, the United States moved for summary judgment, which was subsequently granted for plaintiffs' failure to respond to it.

Plaintiffs filed the instant action, raising several allegations of malpractice arising out of the quiet title litigation. After committing various violations of the trial court's scheduling and discovery orders, plaintiffs' action was dismissed for their failure to appear at a scheduled pretrial conference.

Plaintiffs argue that the court erred in concluding that no manifest injustice resulted from its dismissal. We disagree. Dismissal as a sanction for failure to appear at a scheduled conference is reviewed for an abuse of discretion. *Schell v Baker Furniture Co*, 232 Mich App 470, 474; 591 NW2d 349 (1998), aff'd 461 Mich 502 (2000). An abuse of discretion occurs where the result is not a reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.401 authorizes trial courts to conduct scheduling and pretrial conferences to set issues for litigation and establish time frames for the development of the action. The "[f]ailure of a party or the party's attorney or other representative to attend a scheduled conference . . . , as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B)." MCR 2.401(G)(1). MCR 2.504(B) provides that "[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant." Courts must excuse a failure to attend a scheduled conference, and "enter a just order other than one of default or dismissal," where they find either that "entry of an order of default or dismissal would cause manifest injustice" or "the failure was not due to the culpable negligence of the party or the party's attorney." MCR 2.401(G)(2).

Prior to the dismissal, defendants moved for summary disposition on various grounds, including that plaintiffs' claims were barred by the statute of limitations. In dismissing plaintiffs' action, the court reasoned that no manifest injustice resulted because summary disposition favoring defendants was appropriate. Plaintiffs challenge this conclusion. They argue that summary disposition was inappropriate and that dismissal worked a manifest injustice, requiring a different sanction under MCR 2.401(G)(2).

We conclude that no manifest injustice occurred because summary disposition for defendants would have been appropriate under MCR 2.116(C)(7) on statute of limitations grounds. "A legal malpractice claim must be brought within two years of the date the claim accrues, or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." *Kloian v Schwartz*, 272 Mich App 232, 237; 725 NW2d 671 (2006), citing MCL 600.5805(6) and MCL 600.5838.

With respect to accrual, MCL 600.5838(1) provides that

> a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession accrues at the time that person discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

Various rules have been developed to determine when an attorney-client relationship is "discontinued" for purposes of this accrual. "Generally, when an attorney is retained to represent a client, that representation continues until the attorney is relieved of the obligation by the client or the court." *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002). A client's express communication terminating the representation operates to discontinue the relationship. *Id.* at 684, citing *Hooper v Hill Lewis*, 191 Mich App 312, 315; 477 NW2d 114 (1991). "Retention of an alternative attorney effectively terminates the attorney-client relationship between the defendant and the client." *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994).

Based on the foregoing, plaintiffs' action is barred by the limitations period in MCL 600.5805(6) under an accrual inquiry. Under a variety of theories, defendants' representation of plaintiffs terminated more than two years prior to the commencement of this malpractice action.

A client's express communication terminating the representation operates to discontinue the relationship. *Mitchell*, *supra* at 684. Plaintiffs expressly terminated defendants' representation on June 3, 2002. Retaining alternate counsel effectively terminates the relationship. *Maddox*, *supra* at 450. Plaintiffs retained alternate counsel, concerning their quiet title action, on June 13, 2002. Representation discontinues when an attorney is relieved of the obligation by a court. *Mitchell*, *supra* at 683. Defendants were relieved of their representation of plaintiffs by court order on July 15, 2002, following their motion to withdraw. Under these rules, defendants' representation of plaintiffs was discontinued and plaintiffs' action accrued. MCL 600.5838(1). And under any of these theories, the two-year period of limitations for this malpractice action expired, at the latest, on July 15, 2004. MCL 600.5805(6); see also *People v Sinclair*, 247 Mich App 685, 688-689; 638 NW2d 120 (2001) (applying MCR 1.108 to computations involving statutes of limitations). Plaintiffs did not file this action until July 16, 2004. The limitations period had therefore run and plaintiffs' action is barred. MCL 600.5838(2); *Kloian*, *supra* at 237.

Responding to defendants' motion, plaintiffs argued before the circuit court that their action did not accrue until July 18, 2002. They claimed that defendants effectively "revived" the representation on this date by filing a motion for relief from judgment, on plaintiffs' behalf, following the grant of summary judgment to the United States in the underlying action. This argument is without merit.

In *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 537; 599 NW2d 493 (1999), we addressed "whether an attorney's brief revisitation of an otherwise closed case in order to investigate and correct an alleged error attendant to the earlier representation has the effect of extending the previous representation for purposes of identifying when the applicable period of limitation for a malpractice action begins to run." We noted that a

> lawyer has an ethical duty to serve the client zealously. Some of a lawyer's duties to a client survive the termination of the attorney-client relationship, most notably the general obligations to keep client confidences and to refrain from using information obtained in the course of representation against the former client's interests. Sound public policy would likewise encourage a conscientious lawyer to stand ever prepared to advise a former client of changes in the law bearing on the matter of representation, to make a former client's file available if the former client had need of it, and, indeed, to investigate and attempt to remedy any mistake in the earlier representation that came to the lawyer's attention. To hold that such follow-up activities attendant to otherwise completed matters of representation necessarily extends [sic] the period of service to the client would give providers of legal services a powerful disincentive to cooperate with a former client who needs such attention. We conclude that the proper inquiry is whether the new activity occurs pursuant to a current, as opposed to a former, attorney-client relationship. [*Id.* at 538-539 (citations omitted).]

Though defendants filed a motion for relief from judgment on plaintiffs' behalf, defendants expressly acknowledged that their representation of plaintiffs had terminated. Their motion was merely an attempt to preserve their former clients' interests. That the representation had discontinued was confirmed by the court's response, denying the motion because defendants

could no longer advocate on plaintiffs' behalf. Defendants' motion related to activities occurring during their relationship with plaintiffs. It accordingly concerned defendants' "earlier, terminated representation," and was not a "legal service in furtherance of a continuing or renewed attorney-client relationship." *Id.* at 540. And because this did not effectively revive defendants' relationship with plaintiffs, it necessarily did not have the incidental effect of extending the representation for purposes of determining the accrual date of plaintiffs' malpractice action. See *id*.

The period of limitations may also be evaluated under the "discovery rule." MCL 600.5838(2) provides that

> an action involving a claim based on malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. The burden of proving that the plaintiff neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A malpractice action which is not commenced within the time prescribed by this subsection is barred.

This provision permits a malpractice action to "be commenced within six months after the plaintiff discovers or should have discovered the existence of the claim if such discovery occurs after the two-year limitation period." *Fante v Stepek*, 219 Mich App 319, 322; 556 NW2d 319 (1996). When a plaintiff discovered or should have discovered the injury is determined according to an objective standard. See *Gebhardt v O'Rourke*, 444 Mich 535, 540-546; 510 NW2d 900 (1994); *Moll v Abbott Laboratories*, 441 Mich 1, 16-18; 506 NW2d 816 (1993). "[A] plaintiff need only discover that he has a 'possible' cause of action." *Gebhardt, supra* at 544. "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 223; 561 NW2d 843 (1997).

Plaintiffs' various allegations of defendants' malpractice were all objectively discoverable more than six months prior to plaintiffs' institution of this action. By virtue of a June 10, 2002, letter from defendants, plaintiffs objectively became aware that defendants had failed to file a notice of reconveyance, and had failed to afford the United States notice of the tax sale. By way of this letter, defendants also advised plaintiffs to respond to a pending motion for summary judgment filed by the United States, which the court granted on July 8 because no response was filed. Plaintiffs testified that they met with defendants in March 2002 concerning the alleged conflict of interest, thereby indicating their knowledge of it. Plaintiffs were aware that defendants delayed filing the underlying action for approximately one year when they signed the complaint in May 2001. They were aware that defendants had not moved for summary judgment as soon as permitted under the Federal Rules of Civil Procedure when the court granted the United States judgment in July 2002. And defendants' representation of plaintiffs terminated, at the latest, on July 15, 2002, a point at which plaintiffs certainly should have been aware of any "possible" failures in defendants' zeal, to the extent that such failures concerned defendants' representation generally. *Gebhardt, supra* at 540-546; *Moll, supra* at 16-18. In all cases, plaintiffs' allegations of defendants' malpractice were discovered or should have been

discovered between 2000 and 2002. Yet plaintiffs did not file this action until July 2004. The six-month discovery rule in MCL 600.5838(2) therefore plainly expired prior to the institution of this action.

To sustain their burden of proving they "neither discovered nor should have discovered" the foregoing injuries, MCL 600.5838(2), plaintiffs argued before the trial court that after the United States was granted summary judgment in July 2002 in the underlying action, they began consulting with various attorneys between January and March 2004. They argue that it was only at this point that they discovered they "had a malpractice action." This argument fails because it misapprehends the nature of the discovery rule.

> [T]he discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim. A plaintiff must act diligently to discover a possible cause of action and "cannot simply sit back and wait for others" to inform her of its existence. [*Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995) (citation omitted).]

By their own admission, plaintiffs waited for approximately a year and a half—three-quarters of the period of limitations under MCL 600.5805(6)—before seeking professional assistance with their claim. The discovery rule does not protect such dilatory conduct. *Id*. Their argument to the contrary is without merit.

Under either an accrual inquiry or the discovery rule, the period of limitations expired prior to plaintiffs' institution of this action. The action was accordingly time-barred. Summary disposition would have been properly granted in favor of defendants under MCR 2.116(C)(7). As we noted, the circuit court reasoned that no manifest injustice resulted from its order of dismissal because summary disposition favoring defendants would have been appropriate. Though the court's belief that summary disposition was proper was based on different reasons, we "will not reverse a trial court's decision if the correct result is reached for the wrong reason." *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005). The court's observation was ultimately correct. The court thus did not abuse its discretion in concluding that no manifest injustice resulted from the dismissal of plaintiffs' action.

Because our analysis above is dispositive of this appeal, we decline to reach the remaining issues raised by plaintiffs.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra